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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 261

In the Matter of the Application of
STANLEY M. KLEBANOFF, an Attorney,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

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Statement of the Case

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York entered on April 4, 1968, affirming an order of the Appellate Division, First Department disbarring petitioner.

On December 7, 1965, respondents, members of the Coordinating Committee on Discipline, presented to the Appellate Division, a petition charging petitioner Stanley M. Klebanoff with professional misconduct. The petition alleged that, in the course of their continuing inquiry conducted pursuant to an order of the Appellate Division, respondents had inquired into the professional conduct of petitioner as an attorney and counselor-at-law; and that, in the course of such inquiry, petitioner had testified before

the Committee on three occasions. The petition further alleged that, as part of its inquiry, the Committee had examined records maintained by petitioner and others, including official agencies. None of these allegations were disputed by petitioner during the proceedings below. The professional misconduct alleged in the petition included employment in petitioner's law offices of one who had resigned from the Bar and was enjoined from the practice of law (charge 1); submission of false medical reports and bills (charge 2) and false bills of particulars (charge 3) to insurance carriers in personal injury cases; systematic commingling of petitioner's personal funds with moneys recovered upon clients' claims (charge 6); and failure to file statements of retainer and closing statements in violation of the rules of the Appellate Division, First Department (charges 8 and 9).

Petitioner filed an answer, verified January 17, 1966, in which charges 1, 6, 8 and 9 were expressly admitted and the essential allegations of charges 2 and 3 impliedly so (petitioner pleaded lack of knowledge of the falsity of the bills, reports, and bills of particulars referred to in the charges). In addition, the answer set forth allegations in mitigation of the admissions pertaining to charges 1, 2 and 6, and other matters not here relevant. No argument was advanced, by answer or motion, that the Appellate Division should dismiss the petition on the ground that the inquiry on which it was based had been unconstitutional. On February 15, 1966, the court appointed Hugo Pollock, Esq., referee to take testimony with regard to the charges and report to the court.

Four days of hearings were held before the referee. Respondents called seven witnesses and introduced twenty-

nine exhibits, nine of which were objected to for the first time on petitioner's appeal to the Court of Appeals: a portion of the transcript of petitioner's testimony before the Third Manhattan Grand Jury for the December, 1964 term (Ex. 11) and the order authorizing respondents' access to that testimony (Ex. 10); the transcript of petitioner's testimony before the Co-ordinating Committee (Ex. 12); five schedules of personal injury cases in which petitioner admitted his failure to file statements of retainer and/or closing statements (Ex. 17); and certain of petitioner's bank records (Exhibits 21-25, including two checkbooks, one check, one deposit slip, and a three-page bank statement).[1] Seven of these exhibits were received in evidence upon petitioner's express statement that he had "no objection";[2] as to Exhibit 23, petitioner was silent (T. 356).

Petitioner testified in his own behalf and offered four exhibits. At the conclusion of his testimony, which occupied three of the four days of hearings (T. 140-390), petitioner requested and received the referee's permission to

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[1] Exhibits 16 and 20, which are also checks drawn on petitioner's bank account, related solely to charges 4, 5 and 7. Transcript of the hearings before the referee (hereafter cited T. —), pp. 131-132; 272-280. Charge 4 was withdrawn by stipulation during trial, and charges 5 and 7 were not sustained by the referee. Referee's report (hereafter cited R. —), pp. 45-53. Those charges—and the evidence pertaining to them—are accordingly not involved here.

[2] T. 231 (Ex. 11), 355 (Exs. 21, 22), 337 (Exs. 24, 25), 279 (Ex. 12). As to Exhibit 12, the transcript of petitioner's testimony before the Co-ordinating Committee, an objection was at first interposed to the scope of the offer, to the extent that the transcript might be used to impeach petitioner's testimony before the referee on the basis of an inconsistency not inquired into upon cross-examination (T. 371). Upon respondents' express limitation of the offer to exclude the purpose objected to (T. 378), petitioner consented *in haec verba* to the introduction of the entire transcript (T. 378-379).

read into the record a prepared statement summarizing his ill health, recognition of his past "mistakes," and intention to conduct himself differently in the future (T. 390-393).

Referee Pollock's report, filed December 14, 1966, sustained the six charges of professional misconduct discussed above. By order of April 20, 1967, the Appellate Division unanimously confirmed the report of the referee and ordered petitioner disbarred effective May 19, 1967. On May 17, 1967, petitioner brought on an order to show cause why he should not be granted an extension of the time to move for reargument, and of the effective date of his disbarment. An affidavit of Carl Rubino, Esq., counsel for petitioner, in support of the application, included the following statements (pp. 3-4).

> I recognize that on consideration of a motion for reargument, respondent will bear a heavy burden. Due to the nature of the proceeding herein, and particularly because of the charges respondent has admitted, the burden is even heavier than in most cases. . . . The record herein contains substantial evidence in mitigation of the charges sustained against respondent. . . . In preparing to seek reconsideration, I have painstakingly reviewed the entire record herein. I believe that, given some further time to prepare the moving papers, it will be possible to present effectively to the Court matter which will cause it to conclude that imposition of less severe punishment is warranted.

The Appellate Division by order of June 6, 1967, extended petitioner's time to move for reargument and postponed the effective date of his disbarment to June 20, 1967. Petitioner filed his motion for reargument and reconsideration

on June 15, 1967. Among the grounds advanced for reconsideration and the imposition of a penalty less severe than disbarment were a declaration that petitioner "realizes and is most heartily sorry for his carelessness in permitting wrongs to be done in his office" and the following argument:

> . . . respondent's complete frankness and cooperation throughout the proceedings against him should weigh in his favor. As the Referee said, he
>
> '. . . cooperated by making a number of concessions and by voluntarily producing requested files, books, bank statements and other records. His counsel waived the appearance of a number of witnesses including some, whose testimony would have been essential to qualify for admission some of petitioners' 29 exhibits and thus helped to expedite the hearings.' (Referee's Report, page 2.)
>
> This was done because both respondent and deponent considered it the proper course of conduct for an attorney under investigation. But we respectfully suggest that the abstinence from resort to any of the tactics which could have made the inquiry more difficult should be considered by the Court. The policy should be to encourage such frankness and cooperation by giving such conduct significant consideration on the issue of imposition of punishment.[3]

Petitioner's motion was denied by order of the Appellate Division dated June 29, 1967, and his disbarment became effective on July 6, 1967.

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[3] Affidavit of Carl Rubino, Esq., counsel for petitioner as respondent below, dated June 15, 1967, pp. 10-11.

ARGUMENT

I.

Petitioner did not timely raise the claim underlying the petition for certiorari.

Throughout the proceedings below, petitioner placed principal reliance on the theory that his voluntary co-operation was a factor directly relevant to the Appellate Division's determination of the sanction appropriate to his admitted professional misconduct. It was not until his disbarment, upon his appeal to the Court of Appeals, that petitioner first contended that his co-operation was not, after all, voluntary, and that the self-serving testimony on which he based his plea for a mitigated penalty should have been excluded.

Petitioner's objections are of the kind that could have been obviated if they had been raised below. Had petitioner there attacked the constitutionality of the disciplinary proceeding on the ground that respondent's use of his testimony before the grand jury was unconstitutional, respondents would have had an opportunity to introduce evidence of petitioner's professional misconduct from a number of sources unrelated to the grand jury minutes. If, after considering such evidence, the Appellate Division had nevertheless accepted petitioner's contention that the proceeding was founded upon a fatal constitutional defect, it could have dismissed the petition at the outset, and spared the parties and the public the time and expense of trial, judgment and appeal. Similarly, if petitioner had objected to the introduction before the referee of the evidence whose use against him he now characterizes as un-

constitutional, respondents would have had an opportunity to prove by independent evidence the facts which were the subject of petitioner's admissions. For example, if the court below had held that petitioner's confession of failure to file statements of retainer and closing statements was inadmissible in evidence against him upon a new trial, respondents would have been required to call the persons charged by law with custody of these documents to testify whether their achives contain any documents filed by or on behalf of petitioner. Such testimony could, of course, have been adduced before the Referee in 1966, if petitioner had made timely objection to the offer of Exhibit 17; he should not, therefore, be heard to object to it now.

Petitioner's failure to raise these issues below was not, however, a mere passive waiver of objections. Rather, it was his very theory of the case. Petitioner well knew that respondents could have proved all the charges just as conclusively without his admissions, whether judicial or testimonial, of material facts. Had he stood upon his claim of constitutional privilege and elected not to testify in his own behalf, however, the record would have been devoid of even a colorable defense, and it is hard to conceive of the Appellate Division's imposing any penalty short of disbarment. By electing instead to co-operate, petitioner, who had no defense on the facts, supplied himself with one on the law, asking the court to consider his co-operation a mitigating factor and base upon it the assessment of a penalty less severe than disbarment.

Furthermore, although he was in fact disbarred, petitioner nevertheless did benefit from asserting co-operation as his theory of the case in the court below: he was granted an extension of time within which to file a motion for

reargument, and the effective date of his disbarment was postponed, after he filed moving papers in which this theory was relied upon.

Petitioner chose the strategy of candor over the privilege of silence, and the Appellate Division rejected his defense. He sought in the Court of Appeals and now seeks on this petition, to repudiate his unavailing election, and test whether an alternative approach to the "free choice to admit, to deny, or to refuse to answer" (*Lisenba* v. *California,* 314 U. S. 219, 241) will effect a more palatable result. The manifest injustice of such a course is abundantly clear, and it is respectfully urged that this Court should accordingly decline to consider the constitutional issues raised in such a way.

II.

Petitioner's constitutional challenge to the institution and prosecution of the disciplinary proceeding should be rejected.

Petitioner's attack upon the disciplinary proceeding rests upon the Fifth Amendment to the Constitution of the United States, which provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." Petitioner first asserts that he was a "target of the investigation," thus being subject to indictment arising out of the matters under investigation. Consequently, he argues, his testimony before the grand jury was evidence "against himself" in violation of his constitutional right. Assuming, then, that his testimony before the grand jury was unconstitutionally compelled, he invokes a line of cases holding that evidence elicited in violation of con-

stitutional right may not be used against the defendant in a criminal case. In an attempt to bring himself within the holding of these cases, he characterizes a disciplinary proceeding as a criminal case, and argues that the order of the Supreme Court granting respondents access to his testimony before the grand jury amounted, in effect, to an unconstitutional use of his testimony against him.

Respondents are in agreement with the Court of Appeals on the definition of a disciplinary proceeding as one *not* criminal in nature. *Matter of Rouss*, 221 N. Y. 81 was found to be dispositive of the issues in the court below. Just as petitioner was called as a witness in a "criminal case"—*i.e.*, the grand jury's investigation of Philip Weintraub—Rouss was called as a witness in the criminal trial of another; whereas petitioner asserts an implied immunity, arising from the circumstances under which he was called, Rouss was granted statutory immunity. There, as here, the testimony given under immunity from criminal prosecution was introduced in a disciplinary proceeding, and the attorney appealed his disbarment on the same grounds urged by petitioner herein—that the immunity from prosecution he acquired by testifying barred the use of his testimony not only in a criminal case, but in a disbarment proceeding as well. Judge Cardozo, writing for a unanimous Court, rejected this contention:

> A proceeding looking to disbarment is not a criminal case. We do not suggest that the witness is protected by the Constitution only when testifying in the criminal courts. The law is settled to the contrary. But to bring him within the protection of the Constitution, the disclosure asked of him must expose him to punishment for crime. . . . We think that section 584 of the Penal Law was designed to give an immunity

> as broad as the constitutional privilege, and no broader. [221 N. Y. at 86, 116 N. E. at 784.]

Nor did *Spevack* v. *Klein,* 385 U. S. 511, extend the scope of the privilege—or immunity flowing from it—beyond the boundaries defined in *Rouss.* That was a proceeding pursuant to Judiciary Law, §90(2), in which the sole charge of professional misconduct was that the attorney had "refused to honor a subpoena duces tecum duly served upon him, in that he had refused to produce his financial records and had refused to testify before the [Brooklyn Judicial Inquiry]; and that such refusal constituted a breach of his inherent duty as an attorney and counselor at law to divulge to the court all pertinent information bearing upon his character and fitness and upon his conduct and practices as a lawyer." *Matter of Spevack,* 24 A. D. 2d 653. His sole defense was "that the production of the records and his testimony would tend to incriminate him." 385 U. S. at 512-513. The Appellate Division, on the authority of *Cohen* v. *Hurley,* 366 U. S. 117, *aff'g Matter of Cohen,* 7 N. Y. 2d 488, held that the attorney's refusal to testify was a failure "in his inherent duty to the court to divulge all pertinent information necessary to show his character and fitness to remain a member of the Bar and necessary to the proper administration of justice." 24 A. D. 2d at 654. The Court of Appeals affirmed, 16 N. Y. 2d 1048, 1050,

> . . . on the authority of *Cohen* v. *Hurley* (366 U. S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony, but that an attorney produce records required by law to be kept by him (*Davis* v. *United States,* 328 U. S. 582; *Shapiro* v. *United States,* 335 U. S. 1).

The Supreme Court found it unnecessary to reach the question whether the required-records doctrine rendered the privilege inapplicable to certain of the records involved in the *Spevack* case, since the proceedings below had "proceeded on the basis that petitioner could invoke the privilege with respect to the records, but that the price he might have to pay was disbarment." 385 U. S. at 517-518. The question presented, then was the constitutionality of that price:

> And so the question emerges whether the principle of *Malloy* v. *Hogan* is inapplicable because petitioner is a member of the Bar. We conclude that *Cohen* v. *Hurley* should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it. [385 U. S. at 514].

The *Spevack* holding is directed solely to the *type of proceeding* in which the privilege protects against self-incriminating disclosures; it does not alter or expand the *type of disclosure* which is protected against. This distinction, implicit in *Spevack*, is made explicit in *Application of Gault*, 387 U. S. 1:

> . . . the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.

Justice Fortas, writing for the majority in *Gault*, then goes on to adopt the precise language in which the scope

of the privilege was defined in Justice White's concurring opinion in *Murphy*:

> . . . it protects any disclosures which the witness may reasonably apprehend could be used in a *criminal prosecution* or which could lead to other evidence that might be so used. [278 U. S. at 94, quoted with approval, 87 S. Ct. at 1454 (emphasis supplied)].

It is accordingly clear that *Matter of Rouss* is still the law in New York and the Court of Appeals has recently so held in *Matter of Zuckerman,* 20 N. Y. 2d 430, 438-439, *cert. denied,* 390 U. S. 925:

> The evidence which these appellants produced before the Referee cannot be used against them in any criminal proceeding. They had no privilege against making disclosure usable only in a disciplinary proceeding. The constitutional privilege applies only in the case of evidence which might be used against them in a criminal case under the language of the Fifth Amendment. Haber and Zuckerman may have thought that unless they produced this evidence they would be disbarred under *Cohen* v. *Hurley,* but neither [*Garrity* v. *New Jersey,* 385 U. S. 493 (1967)] nor *Spevack* confers upon them a constitutional privilege to withhold evidence which cannot lead to criminal prosecution and bears only upon their right to continue to practice law.

The theory on which appellant predicates his appeal is that he acquired immunity from criminal prosecution when he was subpoenaed to give testimony before the grand jury. Consequently, the use of that testimony cannot "expose him to punishment for crime" as Spevack's could have,

but, like Zuckerman's "bears only upon [his] right to continue to practice law." The Fifth Amendment does not, therefore, prohibit the court from disciplining appellant for professional misconduct disclosed in his grand jury testimony.

Petitioner's reliance upon *Boyd* v. *United States,* 116 U. S. 616 and *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693 is equally misplaced. As this Court noted in *Plymouth Sedan,* the *Boyd* situation required a determination that the criminal law had been violated, the forfeiture there sought being authorized as an alternative to imprisonment and/or fine in the same statute. Consequently, if the claimant there were compelled to give testimony, he would be asked to provide evidence to establish a violation of what this Court concluded was essentially a criminal statute, *i.e.,* to incriminate himself.

This Court has held that disciplinary proceedings are civil rather than criminal in nature, ***Ex Parte Wall,*** 107 U. S. 265, 288. Its rules concerning the discipline of attorneys admitted to its bar have been predicated upon that assumption. Thus, where it is shown to this Court that any member of its bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable to criminal cases, the "accused" is thereby required to come forward to explain his conduct.

Petitioner never established that he was a potential defendant in the criminal investigation which led to his grand jury appearance. There is nothing in the record from which this Court may determine what the scope of the grand jury's inquiry was. In his brief, petitioner poses a

number of rhetorical questions concerning the nature of the grand jury's inquiry; this technique does not, of course, compensate for his omission to introduce below any evidence tending to show that he was in fact within its scope.

Even assuming, *arguendo,* that petitioner was a target of the grand jury's investigation and was in fact immunized against criminal prosecution, such immunity does not extend to disciplinary proceedings. In an effort to overcome the clear wording of the constitutional provision, petitioner argues that this Court's ruling that the Fifth Amendment privilege is available to respondents in disciplinary proceedings as stated in *Spevack* v. *Klein,* 385 U. S. 511 "is sufficient inference to hold that a disciplinary proceeding is not a civil proceeding, but one penal in nature." It is submitted that no decision of this Court warrants such a conclusion.

Moreover, this Court has only recently denied certiorari in an application somewhat analogous to the instant matter. In *Kaufman* v. *The Association of the Bar of the City of New York,* 25 A. D. 2d 48, *cert. denied,* 389 U. S. 1006, petitioner sought to bring a disciplinary proceeding within the meaning of "a criminal case" for purposes of Fifth Amendment application. Respondent in that case presented several sound policy considerations which clearly mitigate against expanding the scope of the Fifth Amendment to include disciplinary proceedings. See also: *Ungar* v. *The Association of the Bar of the City of New York,* 27 A. D. 2d 925, *cert. denied,* 385 U. S. 1006.

Petitioner also cites *Garrity* v. *New Jersey,* 385 U. S. 493 in support of his contention that a disciplinary proceeding is penal or criminal in nature. In *Garrity,* the Court prohibited the use by the prosecution at a *criminal trial* of

testimony compelled by threat of loss of job upon refusal to answer for any reason. The Court concluded that the testimony elicited and sought to be used in support of criminal charges against the defendants had been improperly compelled. Thus it can readily be seen that the Court was not expanding the scope of the privilege but rather addressed itself to the effect of state conduct as constituting improper compulsion exerted upon an individual in order to force him to waive his existing privilege against self-incrimination in the *conventional sense.*

It is abundantly clear that petitioner's attempt to extend the scope of the Fifth Amendment privilege must be rejected. Two recent decisions of this Court make petitioner's position untenable. In *Gardner* v. *Broderick,* 36 LW 4536, decided on June 10, 1968, the Court held (at 4537): "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity* v. *New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal." And, in a companion case decided the same day as *Gardner,* Mr. Justice Fortas noted that ". . . if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the Constitutional privilege, and if they had refused to do so, this case would be entirely different." *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation,* 36 LW 4534, 4535.

III.

Petitioner's contention that this Court's decision in *Spevack* v. *Klein* warrants retroactive application is without merit.

In deciding *Spevack,* this Court gave no indication whether application would be retroactive or prospective only. However, in *Johnson* v. *New Jersey,* 384 U. S. 719, the Court made it clear that the rules announced would have retroactive effect only if the evidence in question was of doubtful reliability and relevancy. The obvious import of such a caveat is that the danger of convicting the innocent should be avoided. Certainly no claim is made here that the evidence which petitioner now calls "tainted" and "coerced" was either inaccurate or unreliable. Indeed, it may be stated that in the context of disciplinary proceedings generally, there is little, if any opportunity to challenge the reliability or relevancy of the evidence. It is thus clear that *Spevack* should be, by the *Johnson* standard, given prospective effect only.

It is also noted that this Court has denied retroactivity to many of the recent constitutional guidelines announced in relation to the rights of criminal defendants. See: *Miranda* v. *Arizona,* 384 U. S. 436; *Escobedo* v. *Illinois,* 378 U. S. 478; and *Tehan* v. *Shott,* 382 U. S. 406.

Petitioner and respondents submitted their briefs addressed to the Referee's report, to the Appellate Division, prior to January 16, 1967, the date on which *Spevack* was announced. Thereafter, petitioner had an opportunity to raise the *Spevack* issue when, upon its order of June 6, 1967, the Appellate Division extended petitioner's time

to move for reargument and postponed the effective date of his disbarment. Petitioner submitted motion papers on his plea regarding the imposition of the disciplinary sanction, well after *Spevack,* but never raised the Constitutional issues herein.

Petitioner's position is not, by any standard, analogous to that of petitioners in *Zuckerman and Haber* v. *Greason,* 386 U. S. 15. In that case one of the attorneys, in the course of the disciplinary proceeding, refused to answer on the ground that to do so might tend to incriminate him. Petitioner in the instant case never invoked the privilege, cooperated freely in the hope that the disciplinary sanction would be something less than disbarment (see I, *supra*) and, even after *Spevack,* failed to raise the issue in the Appellate Division on reargument.

IV.

The evidence introduced against petitioner in the disciplinary proceeding was neither tainted nor compelled.

A major portion of the petitioner's brief (pages 16 to 23) is devoted to attacking the reception of evidence before the referee of (1) his testimony before the grand jury (Ex. 11, Pet. Br. 17), (2) the testimony of the witnesses Schrock, Delarato, Sr., Delarato, Jr., Levine, Dwyer and Dr. Margulies (T. 5-114, Pet. Br. 18), (3) his testimony before the Co-ordinating Committee (Ex. 12), (4) his bank records (Exs. 21-25, Pet. Br. 21-22), the maintenance and preservation of which are required by the Special Rules Regulating Conduct of Attorneys promulgated by the Appellate Division, First Department, and (5) the schedules

(Ex. 17) of cases in which he admittedly filed no statement of retainer or closing statement.[4]

Petitioner objects to the introduction in evidence of the grand jury minutes on the same grounds on which he objects to the order making those minutes available to the Co-ordinating Committee. Those grounds, as has been shown (Point I, *supra*), are without merit, as is the convoluted reasoning that six independent witnesses should be barred from testifying because of the possibility that the matters concerning which they testified may also have been within the scope of the grand jury's inquiry (Pet. Br. 18-20). Moreover, petitioner affirmatively consented to the introduction of the grand jury minutes in evidence (T. 231); whatever objection he might otherwise have been entitled to interpose was consequently waived at that point.

His tardy challenge to the admission of the remaining evidence is equally groundless. Exhibits 21, 22, 23, 24 and 25 were "records validly required by law to be kept" within the meaning of *Shapiro* v. *United States,* 335 U. S. 1, 16 to which, as a consequence, "no constitutional privilege against self-incrimination attaches," *id.* at 5. The applicability of the *Shapiro* doctrine to precisely the kind of bank records involved in this case was reaffirmed by the Court of Appeals in *Matter of Spevack,* 16 N. Y. 2d 1048, 1050, *rev'd on other grounds sub nom. Spevack* v. *Klein,* 385

[4] The suggestion (Pet. Br. 17) that any constitutional significance be attached to the fact that petitioner, in his verified answer, admitted the essential allegations of charge 1 cannot be taken seriously. The testimonial privilege of the Fifth Amendment certainly does not extend to formal judicial admissions, which cannot by any stretch of the imagination be deemed "compelled." Even if petitioner's theory of compulsion were valid, it did not deprive him of the right to put the opposing party to his proof by pleading a general denial.

U. S. 511. The validity of that holding is in no way affected by the reversal of Spevack's disbarment on other grounds, since the opinion expressly states that the Supreme Court did not reach that issue, 385 U. S. at 517. (See also the concurring opinion of Justice Fortas, 385 U. S. at 519-520.)

Even if the privilege were applicable to the records in question, however, they were properly received in evidence before the referee on the same basis as petitioner's testimony before the Co-ordinating Committee (Ex. 12) and the schedule of cases concerning which he testified (Ex. 17): none of this evidence was compelled.

The constitutional right petitioner invokes protects a person from being *compelled* to be a witness against himself, U. S. Const., amend. V, N. Y. Const., art. I, §6. Rather than having been compelled, petitioner, in effect volunteered to testify in the disciplinary proceeding, and asked the Appellate Division to weigh that action in his favor. He now asks this Court to rewrite the privilege to provide that "no person shall be a witness against himself"—whether or not compelled. Such a concept is not unknown in jurisprudence (see discussion in Mr. Justice Douglas' opinion in *Garrity* v. *New Jersey, supra,* concerning a basic distinction between Constitutional and Talmudic Law), but it is not the law of the land. Only by adopting a construction of the Fifth Amendment which represents a radical departure from the settled principles of constitutional interpretation can petitioner's argument be sustained.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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